U.S. Department of Justice

ATTACHMENT 2

Office of Intelligence Policy and Review

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Washington, D.C. 20530

September 4, 1984

MEMORANDUM FOR WILLIAM H. WEBSTER
Chairman, Interagency Group on Counterintelligence

Re: Justice Department Comments on Proposed Options to Limit and Control the Hostile Presence

In response to a request from the Chairman of the IG/CI, the Department of Justice has prepared the following comments on proposed Options 1, 4, 10, 11, and 14 for controlling the hostile presence in the United States. Although not requested, we have also prepared comments on Option 12. The State Department paper attached to the August 29, 1984 IG/CI memorandum as Attachment 2, stated that a legal analysis of the options would be jointly provided by the Departments of State and Justice. To date, we have been unsuccessful in our attempts to coordinate with the State Department. We are therefore submitting the following comments on the options specified in Judge Webster's June 29, 1984 memorandum to the IG/CI as the opinion of the Justice Department.

The following comments provide a legal analysis of the options, to be considered together with the Department of State's comments on the policy aspects of these options. These comments incorporate the concept that national security is a paramount concern of the federal government. The Federalist No. 41 (J. Madison), reprinted in Dennis v. U.S., 341 U.S. 494, 519 (Frankfurter, J., concurring); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-160 (1963); Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964); U.S. v. United States District Court, 407 U.S. 297 (1972). Naturally, this principle affects U.S. foreign relations. See Section 6 of the Annex to the U.N. Headquarters Agreement, 22 U.S.C. 287 note (1976), the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 et seq. (1976); and the Export Administration Control Act of 1979, 50 App. U.S.C. 2401-2420 (Supp. III 1979).

Second, the Foreign Missions Act, 22 U.S.C. 4301-4313 (1982) provides the State Department with new legal tools for enforcing

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a policy of reciprocity in U.S. foreign relations. Because the Act is new, proper use of its provisions will require careful construction of the statute and its intent. Our comments accomplish this and, at the same time, identify those actions that can be taken pursuant to the authorities contained in the Foreign Missions Act without adverse legal consequences.

Option 1. Subject hostile country-owned/controlled U.S. corporations to the same controls and restrictions that OFM applies to foreign missions. The Office of Foreign Missions currently requires all foreign missions in the United States to obtain automobile insurance through OFM and to notify OFM prior to any transaction made in the name of the foreign mission involving real property. 1/ Foreign missions will also soon be required to replace current diplomatic license plates with plates issued by OFM. These requirements apply to all embassies and consulates in the U.S., as well as to U.N. mission and Secretariat personnel who hold full diplomatic or functional immunity, and to OAS, Commission of the European Communities and Liaison Office of the People's Republic of China personnel holding full diplomatic or functional immunity. Further, an additional requirement to arrange for travel services through OFM is currently applied to Cuban and Soviet embassy, consulate and U.N. mission personnel, as well as to the personnel of U.N. missions from Afghanistan, Byelorussia, Iran, Libya, Mongolia, North Korea, the Palestine Liberation Organization, the Ukraine and Vietnam. Although extending a travel service bureau requirement to East European diplomats is being considered, it has not yet been imposed, as it would have to be based on national security considerations rather than reciprocity since American diplomats in eastern Europe currently are not subject to a similar requirement. In addition, the travel requirement does not extend to U.N. Secretariat personnel.

Whether and to what extent these restrictions may also be applied to "hostile country-owned/controlled U.S. corporations" depends first, upon whether the Foreign Missions Act extends to such corporations and second, whether OFM control over such corporations raises questions concerning corporations law, constitutional law or treaty problems.

The Foreign Missions Act provides that the Secretary of State may, after making certain findings, require foreign missions to obtain benefits through, or upon terms and conditions prescribed

1/ We understand from the Office of Foreign Missions that they are also able to detect and prevent the execution of real property transactions made in the names of individual diplomats that are actually mission transactions.

by, the State Department. 22 U.S.C. 4304. "Benefits" are broadly defined to include real estate transactions, public services, supplies, travel services and any other benefit designated as such by the Secretary of State. 22 U.S.C. 4302.

The term "foreign mission" includes "any official mission to the United States involving diplomatic, consular, or other governmental activities of . . . a foreign government, or . . . a territory or political entity [recognized by] the United States, including . . . real property . . . and . . . personnel . . . ." 22 U.S.C. 4302(a)(4). The legislative history states that the definition "could also be applied to state trading organizations operated by some governments, to the extent that the trading organization performs governmental functions." S. Rep. No. 329, 97th Cong., 2d sess. 7 (1982), reprinted in [1982] U.S. Code Cong. & Ad. News 714, 720. Thus, the two requirements that any corporation must be found to satisfy before it can be designated by the Secretary as a "foreign mission" are (1) that the corporation is an "official mission" of the foreign government and (2) that the corporation also performs "governmental activities." Section 202(b) of the Act commits interpretations of these definitions to the discretion of the Secretary of State. 22 U.S.C. 4302(b).

The Act does not elaborate on the term "official mission" except to include state trading organizations as an example. The Diplomatic Relations Act, 22 U.S.C. 254a-e (Supp. IV 1980), which implemented the Vienna Convention on Diplomatic Relations ("Vienna Convention"), April 18, 1961, [1961] 23 U.S.T. 3229, T.I.A.S. No. 7502, provides some guidance in its legislative history. The Act defines a "mission" as,

> missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by the Vienna Convention.

22 U.S.C. 254a(3). The legislative history notes that, although the Vienna Convention does not define the term "mission," the functions of a mission are described in Article 3 of the Convention. S. Rep. No. 958, 95th Cong. Sess. 4, reprinted in [1978] U.S. Code Cong. & Ad. News 1935, 1938. Article 3 of the Vienna Convention lists the functions of a mission as (1) representing the foreign government in the U.S., (2) protecting the interests of the foreign government and its nationals in the U.S., (3) negotiating with the U.S., (4) ascertaining conditions and

developments in the U.S. and reporting those to the foreign government, and (5) promoting friendly relations and developing economic, cultural and scientific relations.

Thus, it may be useful for the Secretary of State to draw on this list of functions in determining whether a corporation owned or controlled by a hostile country satisfies the "official mission" aspect of the definition of a foreign mission.

In addition, the Act and its legislative history are silent on the precise extent to which a foreign-owned corporation must perform "governmental activities" in order to qualify as a foreign mission. Again, some of the functions used in the Vienna Convention to describe a mission could also be used to define "governmental activities." For example, the Secretary could determine that a foreign-owned corporation that promotes the products of the foreign country, negotiates on behalf of, or purchases U.S. products for, the foreign country is engaged in governmental activities. However, a foreign-owned corporation could not be designated a foreign mission merely because it performed these activities, as it would also have to satisfy the "official mission" aspect of the definition. 2/

The operative consideration in subjecting a foreign-owned corporation to the Foreign Missions Act is not, therefore, simply whether the corporation is owned or controlled by a hostile government, but whether the degree and nature of such ownership or

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2/ The Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1811 (Supp. III 1979) may also shed some light on the process by which the Secretary designates foreign-owned corporations to be foreign missions under the Foreign Missions Act. FISA includes corporations in its definition of a "foreign power," inter alia, when they constitute "an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments," or as "an entity that is [covertly] directed and controlled by a foreign government or governments." 50 U.S.C. 1801(a)(3),(6). These definitions were designed to include foreign government airlines, corporations that are controlled by foreign governments and that employ U.S. citizens as employees or officers, or corporations that provide a cover for espionage activities. H.R. Rep. No. 1283, Pt. 1, 95th Cong., 2nd Sess. 29-37 (1978). However, the definitions were not meant to extend to law firms, public relations firms or other corporations that may represent the foreign government, but are not controlled by it. Id. These distinctions may prove useful for determinations under the Foreign Missions Act.

control, and the corporation's activities, support a finding that it is an "official mission" performing "governmental activities." We suspect that the final number of corporations owned or controlled by a hostile country that satisfy the definition of an official mission under the Act will be relatively small, and fairly easy to identify. Were the Secretary to designate as a foreign mission a foreign-owned corporation that did not reasonably fit within the Act's definition, the Secretary could be subject to legal challenges for denying due process and equal protection, as well as interfering with existing foreign trade agreements.

Corporations, even foreign-owned corporations in the United States, are "persons" entitled to due process and equal protection under the Constitution. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1972). Thus, any action taken to regulate corporations must be reasonably related to a permissible legislative objective. Currin v. Wallace, 306 U.S. 1 (1939); Wallace v. Hudson-Duncan & Co., 98 F.2d 985 (9th Cir. 1938); Addison v. Huron Stevedoring Corp., 96 F. Supp. 142 (S.D.N.Y. 1950), cert. denied 346 U.S. 877 (1953); Andrews v. Montgomery Ward & Co., 30 F.Supp. 380 (N.D. Ill. 1939), aff'd sub nom Felming v. Montgomery Ward, 114 F.2d 384 (7th Cir.), cert. denied 311 U.S. 690 (1940). Because the primary objective of the Foreign Missions Act is the regulation of foreign missions rather than corporations, a constitutional challenge by a corporation that is not a state trading organization may succeed.

In addition, any attempt by the Secretary of State to improperly regulate a foreign corporation by executive order or by the promulgation of State Department regulations pursuant to presidential delegation could be subject to challenge as an unconstitutional assumption of legislative power by the Executive. Youngstown Sheet & Tube Co., et al. v. Sawyer, 343 U.S. 579 (1952). 3/ There is also the possibility, which will require

3/ Unless carefully drawn, it is possible that a designation of a foreign-owned corporation as a foreign mission under the Act may lead to the argument that the corporation and its employees are entitled to diplomatic immunity. For example, in U.S. v. Kostadinov, No. 83 Crim. 616 (VLB) (S.D.N.Y. January 17, 1984), rev'd, No. 84-1042, 84-1092 (2nd Cir. May 10, 1984), the lower court reviewed relevant intergovernmental correspondence and concluded that an assistant commercial counselor in the Office of the Commercial Counselor of Bulgaria in New York City was immune from criminal prosecution. Although this finding was reversed on appeal, it illustrates the difficulties that may arise from any State Department designation of a foreign mission that does not carry with it a clear statement that it confers no grant of privileges and immunities under the Vienna Convention on Diplomatic Relations, April 18, 1961, [1961] 23 U.S.T. 3229, T.I.A.S. No. 7502.

further examination by the State Department, that unreasonable applications of the OFM to foreign corporations may lead to charges that the United States is creating trade barriers in violation of international commercial agreements.

In conclusion, before a foreign-owned corporation may be subjected to the Foreign Missions Act, the Secretary of State must determine that the corporation falls under the definition of a foreign mission. These determinations will require careful factual consideration when the designation is to be applied to corporations other than state trading organizations in order to avoid legal challenges.

Option 4. Reduce the number of East European commercial representatives and offices, and close down the office if a representative is arrested for espionage. The legal issue raised by the first part of this option, reducing the number of representatives and offices, is whether the Foreign Missions Act can be used to affect real property transactions entered into by foreign missions prior to the date they were required by the Department of State to begin notifying OFM of such transactions, i.e., whether the Act can be applied retroactively. 4/

Section 205(a) of the Foreign Missions Act, 22 U.S.C. 4305(a), permits the Secretary of State to require foreign missions to notify OFM prior to acquiring, selling or otherwise disposing of real property, allows the Secretary to set terms and conditions for the acquisition or disposition of such property, and permits the Secretary to disapprove a foreign mission's proposed acquisition or disposition of real property.

This section applies not only to the purchase and sale of real property by a foreign mission, but also to the leasing of real property, 22 U.S.C. 4305(a), 4302(a)(5), and the "alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission." 22 U.S.C. 4305(a)(2). In addition, Section 205(b) of the Act permits the Secretary to require a foreign mission to divest itself of, or forego the use of, real property acquired in violation of the Act or in violation of limitations placed on the transaction by the Secretary. 22 U.S.C. 4305(b). The coverage of the Act thus appears to be broad enough to encompass any prospective transaction by a foreign mission pertaining to real property.

4/ The Foreign Missions Act does not automatically require a foreign mission to notify the Department of State whenever it engages in a real estate transaction. The Secretary must first inform a foreign mission that it is required to do so. 22 U.S.C. 4305.

The practical effect of reducing the number of East European commercial offices would be to divest those missions of their interests in the real property they currently occupy and presumably occupied prior to receiving notice from the Secretary of State that they were required to notify the Secretary concerning real estate transactions. Although there was some suggestion in the legislative history that the divestiture provision should be applied retroactively, 127 Cong. Rec. H7916 (Oct. 29, 1981), that suggestion was not carried forward in S. Rep. No. 327, the primary source of legislative history for this Act.

Thus, at first impression, it appears that the Foreign Missions Act was not intended to apply retroactively to real estate transactions consummated prior to the date of notice from the Secretary and that consolidation may be pursued only through diplomatic means and negotiation. A definitive answer to this question, however, would involve research and analysis beyond that conducted in the time available to respond to this Committee. If the Committee wishes to pursue this approach to Option 4, the Department will proceed to develop a formal legal opinion on this subject.

The other legal issue inherent in the first aspect of this option is whether reducing the numbers of representatives and offices, or eliminating offices altogether, would violate whatever bilateral agreements establish those offices. This is a question that must be answered on a case-by-case basis by the State Department.

The second aspect of this option, closing an East European commercial office if a representative is involved in espionage, would accomplish the objectives of this option without violating the bilateral agreements that pertain to that office, or raising the question of the retroactivity of the Foreign Missions Act. While we have not examined these agreements, espionage on the part of a member of an East European commercial office is generally considered under international law to be a violation of the agreement establishing the office, and would entitle the United States to take a variety of responsive measures, including closing the office. This option should also be accompanied by an analysis of the individual agreements establishing these offices, as the specific terms of these agreements may vary.

Option 10. Divest hostile country diplomatic missions of real property owned or leased by them using the authority of the Office of Foreign Missions. This option also raises the issue of the retroactivity of the Foreign Missions Act. As stated

under Option 4, the Act does not clearly provide the Secretary the authority to divest such missions of their previously acquired interests in real property but a definitive answer would require further study.

OFM has begun an active real property control program and has sent a diplomatic note to all foreign missions informing them of the relevant requirements of the Act. The one constraint on this program that we have identified, other than the retroactivity question, is Article 21 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3229, 3237 (Apr. 18, 1961), T.I.A.S. No. 7502. That article requires the United States to facilitate or assist foreign missions in acquiring territory or accommodations for the establishment of the mission. This article appears to preclude the U.S. from denying all suitable accommodations to a foreign mission that it had previously agreed to receive under Article 2 of the Convention, 23 U.S.T. at 3231.

Option 11. Consolidate the three Soviet commercial offices in New York City into one location. This option is similar to Option 4 in that it also raises the issues of retroactivity and consistency with the bilateral agreement governing these offices. These problems would be avoided if any of the offices should desire to change location. The Soviets would be required under the Foreign Missions Act to notify the State Department prior to any move and State could require the relocating office to share facilities with one of the other two offices. While consolidation under this approach may be gradual, it would avoid the problems discussed under Option 4. The procedure discussed under Option 4 for closing an office after an espionage incident could also be applied here.

Option 12. Require hostile country nationals employed at U.N. Headquarters, New York, to use the OFM service bureau for booking commercial travel and accommodations. The Foreign Missions Act permits the Office of Foreign Missions to control the provision of travel services to foreign missions. 22 U.S.C. 4302(a)(1)(E). In addition, section 209 of the Act permits the Secretary to apply the Act to public international organizations and to missions to such organizations, which would include the United Nations and missions to the United Nations. 22 U.S.C. 4309. The legal impediments to applying OFM travel services requirements to UN Headquarters and mission personnel are provisions in agreements concerning the U.N. which the U.S. has ratified and which preclude the United States from impeding the travel of U.N. personnel to and from U.N. Headquarters in New York City. At present, OFM requires only the U.N. Missions listed on page 2 to obtain travel services from OFM in addition to all Cuban and Soviet diplomatic personnel. U.N. Secretariat personnel are not affected.

The U.S. agreed in section 11 of Article IV of the United Nations Headquarters Agreement, 61 Stat. 3416 (1947), T.I.A.S. No. 1676, not to impede the travel to and from UN Headquarters in New York of representatives of UN member countries and their families, officials of the UN and specialized UN agencies and their families, UN experts, accredited media representatives, consultants from non-governmental organizations and other persons invited by the U.N. to its headquarters. In addition, pursuant to Article 100(2) of the United Nations Charter, 59 Stat. 1031 (1945), T.S. No. 993, the United States agreed to respect the "exclusively international character" of U.N. personnel and agreed not to seek to "influence them in the discharge of their duties." In the Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1419 (Feb. 13, 1946), T.I.A.S. No. 6900, the U.S. agreed to facilitate the speedy travel of holders of United Nations laissez-passer (travel documents), and experts and other persons who possess certificates stating that they are traveling on official U.N. business. Article VII, Sections 25 and 26.

We conclude that, while requiring U.N. Secretariat personnel to obtain travel services from OFM would constitute a significant departure from past policies, it would not violate these agreements if the requirement is based on demonstrable national security concerns, it is reasonable, and if it does not unduly delay or otherwise restrict the travel of such persons. These conditions should not be problematic since the purpose of this option is not to impede travel but to obtain current information concerning the U.S. travel of such persons for counterintelligence purposes. We recognize the possibility of protest from the United Nations on the grounds that Secretariat personnel are international civil servants who should not be subject to bilateral diplomatic considerations, and that imposing such a requirement would violate Article 100(2) of the United Nations Charter.

However, the Diplomatic Relations Act is also based upon a concern for national security, 5/ and, in any event, the U.S. retained the right under the U.N. Headquarters Agreement to control the intra-U.S. travel of such persons for national security reasons. We previously concluded that the United States may control the entry of U.N.-affiliated aliens into United States territory, other than the headquarters district and its immediate vicinity, and may exclude such persons altogether, for national

5/ See 22 U.S.C. 4304(b)(2) and October 29, 1981 Cong. Rec. H7915, 7917-7918; April 15, 1982 Cong. Rec. S3545, 3557; and April 27, 1982 Cong. Rec. S4012, 4014 and 4017.

security reasons. 6/ Past United States practice has not been to restrict the entry of such persons unilaterally, but to inform the Secretary-General prior to denying entry to a U.N. alien for national security reasons.

In addition, the United States currently restricts the intra-U.S. travel of aliens in transit to U.N. Headquarters and aliens of the U.N. Missions listed on page 2 to a 25-mile radius of U.N. Headquarters. In keeping with the tenor of these policies we recommend that, while a travel services requirement is essentially already in place for U.N. visitors and certain Mission personnel, the United States should first document the national security threat posed by Secretariat personnel, discuss this program with the Secretary-General prior to its implementation, and restrict the initial implementation to those aliens whose U.N. Missions are already subject to controls. The Office of Foreign Missions has informed us that it has already imposed on the United Nations, without substantial objection, requirements that OFM be notified prior to real property transactions and that certain top-level U.N. officials meet OFM license plate and insurance requirements.

If the United Nations considers the imposition of a travel services requirement to be a violation of any of the above agreements it could, in the case of the Headquarters Agreement, submit the matter for arbitration if negotiations fail to resolve the matter and ultimately, as the Headquarters Agreement and the Convention provide, submit the matter to the International Court of Justice. Headquarters Agreement, Article VIII, Section 21; Convention, Article VIII, Section 30.

It is also possible that Secretariat personnel could challenge a travel services requirement as an unconstitutional denial of equal protection to aliens. However, although aliens are entitled to equal protection under the Constitution, Graham v. Richardson, 403 U.S. 365 (1971), standards and procedures that are more beneficial to United States citizens and resident aliens than to nonresident aliens are permissible as long as the differences are reasonable. See, e.g., Matthews v. Diaz, 426 U.S. 67 (1976); U.S. v. Duggan, Nos. 83-1313, -1315, -1317, -1318 (2nd Cir. Aug. 8, 1984). National security was found in Duggan to be a reasonable basis for distinguishing between citizens and resident aliens on the one hand, and aliens on the other.

6/ See August 30, 1982 Memorandum for Edward J. O'Malley, Chairman, IG/CI, Re: NSSD-2/82 Study Recommendations re: Limitations on the Hostile Foreign Presence in the U.S. (copy attached) and 22 U.S.C. 287 note, Annex to the Headquarters Agreement, Section 6.

Option 14. Close Polish-owned commercial offices to the extent necessary to enable the FBI to reduce or redirect its FCI resources. As under Options 4, 10 and 11, this option also raises the issues of retroactivity and effects on the agreements establishing such offices. The procedure discussed under Option 4 for closing an office after an espionage incident, is also applicable to this Option.

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These conclusions are provided as a basis for further discussion by the IG/CI.

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